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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

JANE J. HEINAN et al., Plaintiffs and Respondents, v. STATE OF CALIFORNIA EX REL. 27TH DISTRICT AGRICULTURAL ASSOCIATION et al., Defendants and Appellants.	C074187 (Super. Ct. No. 11CVPO0171639)

In an action alleging interference with exercise of federal and state constitutional rights (Civ. Code, § 52.1), plaintiffs Jane J. Heinan and MAD-4-SHASTA, a Tea Party association, obtained a permanent injunction effectively allowing them to exercise free speech rights by distributing leaflets in the parking lot of the Shasta County fairgrounds.

Defendants State of California ex rel. 27th District Agricultural Association (operating under the name Shasta District Fair (SDF)), its board of directors, and its chief

executive officer (CEO) Chris Workman -- collectively, SDF -- appeal from the permanent injunction and a later order denying a defense motion to reconsider or modify the injunction. (Code Civ. Proc., § 904.1, subd. (a)(6) [appeal may be taken from order granting injunction or refusing to dissolve injunction].) SDF challenges only two aspects of the injunction. SDF argues (1) its ban on distributing leaflets in the parking lot is a valid time, place, and manner restriction for public safety, and (2) its policy of demanding an advance copy of leaflets is a reasonable measure to ensure that the leaflets are not commercial advertisements that compete with entities which rent the fairgrounds.

We conclude SDF fails to meet its burden to show grounds for reversal, and we affirm the orders granting the injunction and denying reconsideration/modification.

Plaintiffs also pursued damage claims against producers of an event at the fairgrounds, but they state those claims were settled. Those defendants are not parties to this appeal.

FACTS AND PROCEEDINGS

SDF is a state entity which owns the fairgrounds and hosts the annual Shasta County Fair, which lasts five days. (Food & Agr. Code, §§ 3954, 3960.) SDF also rents the fairgrounds to organizations for other events. Event sponsors are responsible for removing debris from the parking lot after the event. Most of the parking lot consists of one-way traffic lanes.

Since the 1990's, SDF has had a policy banning leafleting in the parking lot. The policy allowed free speech activities in designated areas -- "First Amendment Zones" or "Free Expression Zones" (FEZs) -- in front of the main admission gate and a subsidiary gate open to the public during large events. Persons wishing to engage in free speech activities could also rent a booth inside the fairgrounds.

On Saturday, March 27, 2010, plaintiff Heinan and two friends went to the fairgrounds, which was hosting a privately-sponsored Home and Garden Show, and

distributed flyers in the fairgrounds parking lot by offering them to pedestrians or placing them under windshields of parked vehicles. The flyers sought to prevent re-election of the county's District Attorney, who had declined to file criminal charges against a person whom Heinan blamed for her son's death.

Sergeant Brent Giordano of the California Highway Patrol (CHP), which polices the state-owned fairgrounds, informed plaintiffs of the ban on leafleting in the parking lot, but they refused to comply and were asked to leave.

In March 2011, plaintiffs filed a complaint for damages and injunctive relief, alleging violation of state and federal constitutional rights to free speech and expressive activity.

In May 2011, SDF amended its policy in "Free Speech Activities Guidelines," which among other things stated SDF would designate "Free Expression Zones" (FEZ) outside of the paid gate, where members of the public may conduct free speech activity, and such activity was not allowed outside of the zones. The Guidelines specified that "free speech activities" do not include one-on-one voluntary discussions. The Guidelines state the parking areas become congested during events, with pedestrian traffic generally confined to narrow walkways to and from the parking areas to the various gates. The FEZs "are designed to balance the interests of those engaged in free speech activity and being given reasonable access to the patrons of events of SDF, and the safety of the patrons and prevention of accidents or congestion which could lead to injury."

Plaintiffs filed a motion for preliminary injunction. The parties reached a partial settlement. SDF agreed to an injunction stating among other things that it would not confine people to the FEZ and would allow them to walk freely or place a table in the areas in front of the entrance gates, as long as they did not disrupt pedestrian or vehicle traffic and stayed out of fire zones, handicapped parking areas, and the portions of the parking lot where patrons park or drive. The parties agreed SDF could ban purely commercial speech.

The parties could *not* agree and accordingly submitted to the trial court the issues (1) whether SDF could prohibit leafleting to persons and vehicles in the parking lot, (2) whether SDF could ban person-to-person contact between persons engaged in expressive conduct and pedestrians in the parking lot, and (3) whether SDF could demand an advance copy of leaflets to enforce the ban on commercial speech.

These disputed issues were submitted to the trial court for decision on a *permanent* injunction.

SDF submitted diagrams of the fairgrounds and a declaration from Chris Workman, SDF's CEO since 2005. She described the fairgrounds parking lot as containing "narrow, one-way lanes for traffic," and "[b]ecause of the narrow parking stalls and traffic lanes," SDF has maintained a policy of "keeping the parking lot as free of pedestrian traffic as possible" by prohibiting "leafleting, tailgating, distribution of materials, or other gatherings in the parking lot while events are occurring in the fairgrounds. SDF does this primarily to ensure vehicle and pedestrian safety; SDF does not want people being injured by vehicles, or drivers injuring pedestrians, due to congestion in the parking lot. While SDF cannot prevent every possible risk to pedestrian safety, SDF is wary of the serious consequences of a vehicle-pedestrian accident and knows that such an accident could also impact other people who saw such an accident, or could not exit or enter the parking lot, should emergency vehicles need to enter the parking lot." The trial court initially sustained plaintiffs' objection that Workman was merely speculating on the reasons for the 1999 policy because she did not start working for SDF until 2005. Workman later revised her declaration, adding that she reviewed SDF's official records dating back to 1996.

Workman also attested SDF has received "hundreds of complaints" during her tenure about "materials left on vehicles, flyers or other materials that are thrown on the ground after [being] left on vehicles, and papers that are blown onto neighboring properties from the parking lot. The litter that is left behind following the placement of

flyers, papers, etc., on windshields affects renters of the fairgrounds because they have to spend additional funds on maintenance to clean the parking lot and our neighbors complain about the mess as well. Patrons of events complain that their car alarms are set off by leafleters, and vehicle owners complain that their attempts to park and travel through the parking lot are affected by the increase of pedestrian traffic. The car alarms, when heard, alert fair security who are instructed by SDF to investigate every alarm that they hear, which in turn means that their attention is diverted from other possible issues." Workman attested SDF immediately stops leafleting in the parking lot as soon as they become aware of it. She did not explain why there would be "hundreds of complaints" about an activity (leafleting vehicles) not allowed or tolerated by SDF.

Workman attested the 2011 Guidelines are modeled on other fairground policies, such as the California State Fair.

SDF also submitted a declaration from CHP Sergeant Giordano, who spoke of his training and experience in dealing with traffic collisions, which can hurt or kill people. He opined that leafleting in parking lots is "extremely dangerous." He described the fairgrounds parking lot as consisting of "narrow, one-way traffic lanes in between parking stalls. These lanes are not wide enough for two vehicles to pass each other in opposite directions safely. The narrow lanes increase the risks inherent in automobile-pedestrian collisions." He opined the fairgrounds parking lot "is not large enough to accommodate the increase in pedestrian traffic that unrestricted leafleting will cause."

After a hearing, the trial court issued a ruling to grant the permanent injunction, stating the parking lot was a public forum, and SDF could impose time, place, and manner restrictions on free speech as long as they are content-neutral, narrowly tailored to serve an important government interest and allow ample alternative channels for communication. The trial court found the restrictions here were content-neutral, and there is a significant interest in pedestrian and traffic safety and preventing congestion, but SDF failed to show the proposed communicative activity endangers those interests.

SDF failed to meet its burden of demonstrating that the addition of a handful of individuals in areas other than the FEZ would substantially exacerbate the problem of traffic congestion and safety. The court reasoned that if plaintiffs had been fairground event attendees rather than protestors their presence would have also contributed to the congestion and the traffic danger. The court cited a federal case, *Kuba v. 1-A Agric. Ass'n* (9th Cir. 2004) 387 F.3d 850 (*Kuba*), which held that the interest in ensuring traffic safety and preventing congestion did not justify San Francisco's Cow Palace in banning expressive activity in the parking lot and restricting it to FEZs, in the absence of evidence of the number of past demonstrators so as to gauge likely future impact of allowing the activity. The trial court here also cited authority that preventing a marginal increase in the quantity of litter did not justify the restriction on leafleting.

The trial court acknowledged a California case supported a ban on leafleting in a parking lot (*Savage v. Trammell Crow Co*. (1990) 223 Cal.App.3d 1562 (*Savage*)) but said *Savage* was distinguishable because it involved a *private* shopping mall and was decided before the California Supreme Court found private malls to be public fora.

As to SDF demanding an advance copy of leaflets, the trial court ruled it inappropriate.

On December 10, 2012, the trial court issued a written order, signed by the judge, granting a permanent injunction. The permanent injunction, filed on January 28, 2013, enjoined SDF from implementing various components of its "free speech activities" policy. On appeal, SDF challenges only the restraints on its policy of (1) prohibiting leafleting in the parking lots and (2) demanding an advance copy of leaflets. The injunction enjoined any policy that:

"(H) Prohibits or otherwise restricts or regulates the leafleting of parked vehicles in any parking lots owned, leased, controlled, or managed by the SDF, *except* SDF may properly prohibit or otherwise restrict any person from (i) intentionally or recklessly interfering with the lawful movement of vehicles or pedestrians by any person engaging

in free speech or expressive conduct activities, (ii) placing a leaflet on a parked vehicle that prominently displays a sign or other notice prohibiting leafleting or handbilling, or (iii) intentionally, recklessly or negligently damaging or destroying private or public property;

"(I) Prohibits or otherwise restricts or regulates pedestrian-to-pedestrian contact or leafleting in any parking lots owned, leased, controlled, or managed by the SDF, *except* SDF may properly prohibit or otherwise restrict any person from (i) intentionally or recklessly interfering with the lawful movement of vehicles or pedestrians, (ii) engaging in personal conduct that intentionally or recklessly harasses any pedestrian, or (iii) intentionally or recklessly follows any pedestrian who has clearly indicated that he or she does not want to make contact with or accept a leaflet from a person engaging in free speech or expressive conduct activities;

"(J) Requires or mandates that any person provide to the SDF a copy of any leaflet prior to engaging in free speech or expressive conduct activity to determine the content of that leaflet; . . . ." (Orig. italics.)

Meanwhile, on December 13, 2012, we issued an opinion in *Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322 (*Prigmore*), which held the trial court in issuing a *preliminary* injunction, effectively allowing the Tea Party to leaflet in a city library's parking lot, abused its discretion by failing to consider *Savage* and failing to resolve the factual issue as to whether leafleting in a city library's outside areas including the parking lot presented a valid safety concern, as asserted by the city. (*Id.* at pp. 1344-1347.) Instead, the trial court addressed only the government's asserted interest in " 'curbing litter.' " (*Id.* at pp. 1344-1345.) Therefore, the trial court abused its discretion in enjoining the city from enforcing its ban on leafleting in those areas, and we struck that portion of the injunction. (*Id.* at p. 1347.)

Based on *Prigmore*, SDF filed a motion for "reconsideration" based on new law, under Code of Civil Procedure section 1008. The parties agreed to have the court hear

the motion under that statute and Code of Civil Procedure section 533, which allows a court to "modify or dissolve an injunction . . . upon a showing that there has been a material change in the facts upon which the injunction . . . was granted, that the law upon which the injunction . . . was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction . . . ."

In opposition to SDF's motion, plaintiffs submitted photographs of the fairgrounds premises and a declaration from their attorney as to his perceptions from his own visit, that it was "less harrowing" to access pedestrians and vehicles in the general parking lot areas that in some of the spaces allowed for free speech, and one such space cut him off from most pedestrians traversing the parking lot to the main gate.

In reply, Workman revised and resubmitted her declaration, adding that SDF was willing to designate an additional two gates as FEZs (gates 6 and 8, which are the only other gates open to the public). She also attested SDF has no records showing the cost of the impact of people distributing materials outside of the FEZs because such conduct has not been allowed since 1999. SDF has not received any complaints from persons using the FEZs, and "We do not believe, nor has anyone told us, that these areas are too small to accommodate [persons] engaging in free expression activities."

After a hearing, the trial court declined to modify the injunction, stating *Prigmore* stands for the proposition that a trial court must find sufficient evidence before it can issue a preliminary injunction banning activity. "Here, ample evidence supports a conclusion that, given the geography of the fairgrounds, the ban on leafleting, as drafted and applied, constitutes an unconstitutional impediment to free speech." The court also found *Savage* distinguishable, because there were ample alternative channels, in that case, the shopping center's sidewalks. Here, said the court, "[p]laintiffs have submitted evidence in the form of photographs to demonstrate that, unlike the shopping center in *Savage*, there are no sidewalks or other areas where Plaintiffs (or others) can engage in free expression activities. There are some small areas identified where these activities

could occur, but they are not pedestrian traffic areas; and the areas where patrons access the fairground entrances are not connected to any sidewalks or pedestrian walkways. If there is a ban on these activities in the parking lots, then that ban, in effect, is restricting the free expression activities to narrowly defined areas around the entrances, which this Court has already determined is improper. It appears from the evidence submitted that there are no sidewalks or similar pedestrian travel areas as there were in *Savage*, that would give Plaintiffs or others seeking to engage in free speech activities adequate alternatives to communicate their message." That no others have complained did not make the restrictions constitutional.

The court added: "Defendant contends that Plaintiffs' photographs show ample room in the parking lots where cars are prohibited from parking, where people can engage in free expression activities. With this reasoning, it again appears that SDF is trying to limit expressive activities to small defined areas around the entrances. The Court has already declined to do so."

On June 28, 2013, SDF filed a notice of appeal from the January 28, 2013, formal order granting the permanent injunction, and the May 31, 2013 "order" ("ruling" signed by the judge) denying modification. A formal order denying modification was filed on August 16, 2013. The appeal is timely as to both matters. (Code Civ. Proc., § 904.1, subd. (a)(6) [order denying dissolution of injunction is separately appealable]; Cal. Rules of Court, rule 8.108(e) [time to appeal from original order is extended to 30 days after denial of reconsideration of that order under Code Civ. Proc., § 1008]; rule 8.100(a)(2) [treat premature notice of appeal as a timely appeal from the subsequently-filed order].)

DISCUSSION

I. *Standard of Review*

"The trial court's decision to grant a permanent injunction rests within its sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of

discretion. [Citation.] Such continuing relief by injunction operates in the future. [Citation.] A reviewing court will exercise its independent judgment when it is required to interpret and apply a statute where the underlying facts are not in dispute. [Citation.]" (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912 (*Shapiro*).) When the trial court's order involves interpretation and application of a constitutional provision, a question of law is raised that is subject to de novo review. (*Prigmore, supra*, 211 Cal.App.4th at p. 1333.) It is an abuse of discretion for a trial court to misinterpret or misapply the law. (*Id*. at p. 1334.)

"[T]o the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, an appellate court will review such factual findings under a substantial evidence standard. Our power in this regard 'begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.] [¶] When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.' [Citation.]" (*Shapiro, supra*, 96 Cal.App.4th at p. 912, italics omitted.)

II. *Parking Lot*

A. *Free Speech Principles*

The First Amendment of the United States Constitution states Congress shall make no law "abridging the freedom of speech." It applies to the States through the 14th Amendment. (*Prigmore, supra*, 211 Cal.App.4th at p. 1335.)

The California Constitution's "liberty of speech" clause provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).)

The California clause is broader and more protective than the federal First Amendment. (*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366-367 (*Los Angeles Alliance*).) *Prigmore, supra*, 211 Cal.App.4th at p. 1337, noted that California courts have declined to adopt the "basic incompatibility" test applied by federal courts (e.g., *Kuba, supra*, 387 F.3d 850) in deciding whether a location is a public forum under California law, i.e., whether communicative activity is incompatible with normal activity of the venue. Instead, California asks whether the area is similar or dissimilar to areas that have already been determined to be public forums. (*Ibid*.) For example, the California Constitution protects the right to free speech in a shopping mall, even though the federal Constitution does not. (*Fashion Valley Mall, LLC v. National Labor Relations Bd*. (2007) 42 Cal.4th 850, 862 (*Fashion Valley Mall*) [union could conduct peaceful boycott of mall tenant because mall was similar to streets and sidewalks of a central business district]; see also, *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908 (*Robins*).) Despite this broader protection, California courts analyzing the California clause employ the same time, place, and manner test as the federal courts. (*Los Angeles Alliance, supra*, 22 Cal.4th at p. 364, fn. 7.)

SDF argues we need not "wrestle" with the question whether the parking lot is a public forum, because even in a public forum, the government can impose reasonable time, place, and manner restrictions on free speech/expression (*Prigmore, supra*, 211 Cal.App.4th at p. 1335), and SDF views its content-neutral Guidelines as a reasonable time, place, and manner regulation subject to intermediate scrutiny.

"Even in a public forum, the right of free speech may be restricted by reasonable restrictions on its time, place, or manner. [Citation.]" (*International Society for Krishna Consciousness of California Inc. v. City of Los Angeles* (2010) 48 Cal.4th 446, 455 (*ISKCON*), citing *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791 [105 L.Ed.2d 661] (*Ward*).) "In reviewing the validity of a restriction on free expression on public property, there is no need to wrestle with the sometimes difficult question of whether the

public property constitutes a public forum if the regulation qualifies as a reasonable time, place, and manner restriction. If so, the regulation is valid whether or not the area constitutes a public forum." (*ISKCON, supra*, 48 Cal.4th at p. 455, fn. 5 [declining to decide whether airport is public forum and instead holding ordinance prohibiting immediate receipt of funds was valid time, place, and manner restriction even assuming airport was public forum].)

" '[E]ven with regard to protected activity, a regulation may be enforceable if it survives the intermediate scrutiny of time, place, and manner analysis.' [Citation.] The [restriction] will survive such intermediate scrutiny if 'it is (i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication. [Citation.]' ([Citations.] '[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." [Citations.].')" (*ISKCON, supra*, 48 Cal.4th at p. 456 [city ordinance prohibiting solicitation and immediate receipt of funds at airport was valid time, place, and manner restriction of free expression].)

"In order to qualify for intermediate scrutiny, a time, place, and manner regulation of protected speech must be content neutral, in contrast to content-based regulations, which are subjected to strict scrutiny. [Citation.] To be content neutral, a regulation must 'be "justified" by legitimate concerns that are unrelated to any "disagreement with the message" conveyed by the speech. [Citation.]' [Citations.]" (*ISKCON, supra*, 48 Cal.4th at p. 457; *Los Angeles Alliance, supra*, 22 Cal.4th at pp. 364-368 [regulation prohibiting solicitation is content-neutral]; see also, *Ward*, *supra*, 491 U.S. at p. 791 ["regulation that serves purposes unrelated to the content of expression is deemed neutral"].)

For purposes of this appeal, we employ the intermediate scrutiny standard applied by both sides and the trial court, and conclude SDF fails to show reversible error.

B. *Sufficiency of Evidence*

SDF argues its policy is content-neutral and reasonable. The policy allows people to express themselves at locations other than the parking lot -- outside the entrance gates or inside the gates by renting space or by personally approaching patrons. SDF argues that, since its reasons for the policy are to protect the safety of patrons and pedestrians, cut down on litter, and promote the efficient flow of vehicular and pedestrian traffic, the policy is reasonable. SDF thus treats this appeal as presenting a question of law, arguing the trial court misapplied the law by substituting its own beliefs and not deferring to SDF's decision that leafleting in the parking lot is a potential safety violation.

However, this appeal presents a substantial evidence question. While plaintiffs have the general burden of establishing elements warranting injunctive relief (*Kaufman v. ACS Systems, Inc*. (2003) 110 Cal.App.4th 886), defendants have the burden of justifying the restriction on speech. (*Prigmore, supra*, 211 Cal.App.4th at p. 1341.)

SDF relies on the principle that " ' "[i]n determining whether a regulation is narrowly drawn, . . . we must give some deference to the means chosen by responsible decisionmakers. [Citation.]" . . . To be narrowly drawn, a regulation " 'need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government[al] interest that would be achieved less effectively absent the regulation." [Citations.] . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most

appropriate method for promoting significant government interests" or the degree to which those interests should be promoted. [Citations.]' [Citations.]" [Citations.]' " (*Prigmore, supra*, 211 Cal.App.4th at pp. 1341-1342, citing *Savage, supra*, 223 Cal.App.3d at pp. 1574-1575.)

SDF cites no authority that the court must defer to the government decisionmaker's opinion as to whether the free speech restriction leaves "ample alternative avenues of communication," where the government fails to submit substantial evidence supporting the matter. Moreover, deference does not mean default or abdication of the court's responsibility to decide constitutional questions. (*Los Angeles Teachers Union, etc. v. Los Angeles City Board of Education* (1969) 71 Cal.2d 551, 557].) The trial court did defer to SDF's point, conceded by plaintiffs, that public safety is a significant governmental interest.

What SDF fails to do on appeal is meet its burden to demonstrate that the evidence is insufficient to support the trial court's factual finding that the parking lot ban did not leave adequate alternative avenues of communication and was therefore invalid on that basis.

SDF argues this case is "virtually identical" to *Prigmore*. However, aside from the distinction that *Prigmore* involved a *preliminary* injunction, with different standards than the *permanent* injunction at issue here (*id.* 211 Cal.App.4th at p. 1333), *Prigmore* turned on the trial court's failure to resolve the factual question "whether a concern for safety supported by an expert declaration was a sufficient governmental interest to justify the ban on leafleting in the parking lot." (*Id.* at p. 1345.) Here, the trial court did resolve all factual questions, finding the policy invalid as a time, place, manner restriction because it did not leave adequate alternative avenues of communication. Accordingly, it is SDF's burden as appellant to show insufficiency of the evidence to support the trial court's finding that the alternative channels of communication were inadequate to justify the parking lot ban. (*Shapiro, supra*, 96 Cal.App.4th at p. 912.)

SDF argues the "most salient part" of *Prigmore* is that it held the city could ban leafleting of vehicles in the library parking lot. Not so. More important is how we got there -- due to the trial court's failure to resolve "the factual issue as to whether leafleting in the parking lot was a valid safety concern. Instead, the court identified the City's 'significant governmental interest' as only 'curbing litter.' The court then relied upon *Klein v. City of San Clemente* (9th Cir. 2009) 584 F.3d 1196, (*Klein*) [concern about litter did not justify free speech restraint] [brackets added]), and disregarded *Savage, supra*, 223 Cal.App.3d 1562. The City contends this was error and we agree. Because the trial court failed to answer the question squarely before it -- whether a concern for safety supported by an expert declaration was a sufficient governmental interest to justify the ban on leafleting in the parking lot -- its ruling on this issue was arbitrary, based on the wrong law, and thus an abuse of discretion. [Citation.]" (*Prigmore, supra*, 211 Cal.App.4th at pp. 1344-1345.) As a consequence, we modified the preliminary injunction to strike the restraint on the city's enforcement of its ban on leafleting in the parking lot. (*Id*. at p. 1347.)

The evidence in *Prigmore* was a declaration from the city's traffic operations manager, stating that parking lots are designed to minimize conflicts between pedestrian traffic and circulating vehicles and, based on his training and experience, leafleting on windshields in parking lots will increase pedestrian versus vehicle conflict points due to persons moving between cars to place leaflets and persons moving about or stopping in the parking lot to remove leaflets. (*Id*. 211 Cal.App.4th at p. 1344.) The plaintiffs submitted evidence that they had placed leaflets on vehicle windshields in April 2011 without creating or causing a safety or security issue. (*Ibid*.)

Prigmore continued: "In *Savage, supra*, 223 Cal.App.3d 1562, the Court of Appeal upheld a ban on leafleting in a shopping center parking lot. Emphasizing the deference to the means chosen by responsible decision makers, the court found the ban on leafleting was narrowly drawn because it furthered the shopping center's 'interest in

controlling litter and traffic.' [Citation.] 'Burns, the responsible decisionmaker, could reasonably conclude, as he did, that without the ban the litter and traffic burden created not just by Savage, but by the center's merchants and other political or religious groups, would make the parking lot unsightly, inconvenient and unsafe for the center's patrons. [Citation.]' [Citation.] Finally, the *Savage* court found the ban on leafleting in the parking lot 'especially appropriate' because the policy did not prevent leafleting on the center's sidewalks and thus leafleteers [sic] could still reach the center's patrons. [Citation.] *Savage* was cited with approval in *ISKCON, supra,* 48 Cal.4th at pp. 457-458." (*Prigmore, supra*, 211 Cal.App.4th at p. 1345.)

In *Prigmore*, the trial court incorrectly declined to consider *Savage* on the ground it involved a shopping mall and was decided before *Fashion Valley Mall, supra*, 42 Cal.4th 850, held shopping malls were public forums. (*Prigmore, supra*, 211 Cal.App.4th at p. 1345.) The trial court instead relied on federal case law, *Klein, supra,* 584 F.3d at p. 1199, which questioned whether litter prevention can constitute a sufficiently significant government interest to justify interference with free speech, and found the city failed to show a nexus between leaflets placed on vehicles and an increase in litter. (*Prigmore, supra*, 211 Cal.App.4th at p. 1345.) We observed *Savage* was decided after *Robins, supra*, 23 Cal.3d at p. 908, which held a privately owned shopping center was a public forum. (*Prigmore, supra*, 211 Cal.App.4th at p. 1345.) "While *Savage* involved private property, the property was a public forum. Similar interests in avoiding disruption of normal activities are present in this case, as the City has an interest in precluding the disruption of the normal operations of the Library. . . . [¶] Here, as in *Savage*, the ban on leafleting applied to a parking lot, not a public street, and public safety, rather than merely litter prevention, was the primary justification for the ban. [Fn. omitted.] We disagree that *Fashion Valley Mall* has undermined *Savage* on this point. *Fashion Valley Mall* disapproved [a prior case] to the extent it held solicitation may be prohibited simply because it competes with the merchants of the shopping center.

[Citation.] *Savage* did not cite [the prior case] for this point. That *Savage* remains good law on the issue of whether the ban on leafleting in the parking lot was narrowly tailored is shown by our Supreme Court's citation with approval of this portion of *Savage* in *ISKCON, supra*, 48 Cal.4th [at pp.] 457-458.

"In short, neither *Klein*, nor the City, nor the trial court offers any persuasive reason to depart from *Savage*. The trial court erred in failing to consider *Savage*. More fundamentally, the trial court erred in failing to consider and address the issue before it, that is, the City's proffered justification of safety for the leafleting ban in the parking lot. Accordingly, because the trial court answered the wrong question and applied the wrong law, we conclude the trial court abused its discretion in granting the preliminary injunction as to the ban on leafleting in the parking lot. Accordingly, we shall modify both preliminary injunctions to strike [the pertinent paragraph] in its entirety." (*Prigmore, supra*, 211 Cal.App.4th at pp. 1346-1347.)

Here, the trial court did consider *Savage* as well as *Prigmore* and did resolve all factual questions. The court found there was insufficient evidence to establish that parking lot leafleting would cause the substantial problems it did in *Savage*. Even assuming for the sake of argument that this finding is unsupported by sufficient evidence, the trial court also found SDF's restriction "does not leave 'ample alternative channels.' " This finding presents an independent basis for affirmance, for which plaintiffs fail to show insufficiency of the evidence.

The trial court noted its prior finding that the small, designated FEZs were inadequate as alternative channels for free speech activity. The court said plaintiffs "have submitted evidence in the form of photographs to demonstrate that, unlike the shopping center in *Savage*, there are no sidewalks *or other areas* where Plaintiffs (or others) can engage in these free expression activities. There are some small areas identified where these activities could occur, but they are not pedestrian traffic areas; and the areas where patrons access the fairground entrances are not connected to any sidewalks or pedestrian

walkways. If there is a ban on these activities in the parking lots, then that ban, in effect, is restricting the free expression activities to narrowly defined areas around the entrances, which this Court has already determined is improper. It appears from the evidence submitted that there are no sidewalks *or similar pedestrian travel areas* as there were in *Savage*, that would give Plaintiffs . . . adequate alternatives to communicate their message." (Italics added.) Thus, the trial court did not rule that "sidewalks" were the sine qua non of adequate alternatives, as suggested by SDF.

The court noted SDF's contention that plaintiffs' photographs showed ample room in the parking lots where cars are prohibited from parking, where people can engage in free expression activities, but "it again appears that SDF is trying to limit expressive activities to small defined areas around the entrance. The Court has already declined to do so." The court added that absence of complaints did not in itself suffice to satisfy constitutional considerations.

On appeal, SDF complains the trial court made its factual finding of inadequate alternatives based only on the court's own interpretation of photographs, without any expert evidence offered by plaintiffs. However, SDF fails to show that expert evidence was required. In fact, SDF did not offer any defense expert testimony on the subject. The CHP Sergeant who opined that leafleting in the parking lot would increase a risk of accidents did not opine or show any basis for giving expert testimony that the FEZs afforded ample alternative channels for free speech activities. Workman's declaration that SDF "believe[s]" the FEZs are adequate does not demonstrate any expertise for an expert opinion. Moreover, it is undermined by the statement in Workman's original declaration that SDF "limits the number of people per organization in the [FEZs] because SDF seeks to ensure that all groups have an equal opportunity to participate in expressing their views." On appeal, SDF fails to acknowledge this evidence or demonstrate that its expansion of free speech areas dispenses with the need to limit the number of people.

On appeal, SDF claims the photographs show ample room for leafleters outside of the parking lot, particularly a photograph showing the front entrance to the fairgrounds. Neither the photographs nor any other evidence establish adequate alternative avenues of communication as a matter of law.

We conclude SDF fails to show insufficiency of the evidence supporting the trial court's judgment.

III. *Challenge to Advance Copy Demand*

SDF challenges the injunction insofar as it precludes SDF from demanding an advance copy of leaflets before distribution. However, any prior restraint on speech comes with a heavy presumption of unconstitutionality. (*New York Times Co. v. United States* (1971) 403 U.S. 713, 714 [29 L.Ed.2d 822].) Under the California Constitution, a prior restraint on commercial speech bears the same presumption of unconstitutionality and places a heavy burden on defendant to justify the prior restraint. (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 296-297.)

On appeal SDF fails to meet its burden. It simply asserts that plaintiffs agree SDF can ban commercial leafleting that competes with businesses that rent space inside the fairgrounds. SDF then states it "has authority to determine whether proposed leaflets or handbills are commercial advertising. (*Union of Needle Trades v. Superior Court* (1997) 56 Cal.App.4th 996, 1014-1015.)" This assertion says nothing about *prior* restraint. SDF offers no description of facts or analysis from the cited case and fails to show how it applies here. Our own review of the cited case reveals nothing about commercial speech; rather, the appellate court saw no constitutional impediment to a mall requiring prior submission of signs and posters so it could determine whether they met the objective guidelines for the number and size of such signs. (*Ibid*.) The court added that prior approval would inure to the benefit of the applicant who would have time to fix any problems before the day of its activity, including fixing any objectionable language such

as "fighting words." (*Ibid*.) The court did not mention the presumption of unconstitutionality. (*Ibid*.) Thus, the cited case does not help SDF.

Additionally, SDF's appellate argument claims its ability to protect tenants from competing commercial activities cannot be satisfied without prior inspection of materials, but SDF cites no evidence supporting this claim.

We conclude SDF fails to show grounds for reversal.

DISPOSITION

The order granting the permanent injunction and the order denying reconsideration or modification are affirmed. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

HULL, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.